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Supreme Court, U.S.
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No. 05-184

In The

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

[REQUIREMENT OF CIVILIAN JURY TRIAL]

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to punish persons without a trial by jury, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE

Salim Ahmed Hamdan had some involvement with the Al-Qaeda terrorist network in Afghanistan between 1996 and 2001. The precise nature of that involvement is a matter of some dispute. The Government contends that Hamdan was a member of a conspiracy to commit murderous attacks on civilians. Hamdan denies those allegations and claims he performed only harmless, mundane tasks, such as driving Osama bin Laden from place to place.

[1] The parties' consent to the filing of this *amicus* brief have been lodged with the Clerk of this Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

By way of background, after the September 11th terrorist attacks, President Bush ordered the U.S. military to attack Al-Qaeda's base camps in Afghanistan. During this conflict, Hamdan was captured by Afghani militia forces in November 2001. The militia turned Hamdan over to the American military, which, in turn, moved him to the Guantanamo Bay Naval Base in Cuba. The legality of Hamdan's imprisonment in a military facility is *not* an issue in this case.

The Government is now seeking to prosecute Hamdan for certain offenses before a special military commission. The Government contends that once the Executive makes an "enemy combatant" determination, the prisoner is essentially a rightless creature. According to President Bush's Military Order, which establishes the military commission, the accused "shall not be privileged to seek any remedy . . . in any court of the United States, or any State thereof." Section 7(b)(2). Despite the terms of that order, Hamdan challenges the legality of the military commission that is seeking to establish its jurisdiction to try him for certain offenses.

SUMMARY OF ARGUMENT

Since the September 11th terrorist attacks, the Government has made several sweeping constitutional claims – most notably that the Executive can seize American citizens, place them in solitary confinement, deny any and all visitation, including with legal counsel, and, in effect, deny prisoners access to Article III judges to seek the habeas "discharge" remedy. According to the Government, the salient legal point is whether or not the Executive has issued an "enemy combatant" order to his

Secretary of Defense. Once the "enemy combatant" order is produced, it is argued, the courts must abstain so as not to encroach upon the Executive's "inherent powers." In effect, the Government is using the "enemy combatant" label to revive Attorney General James Speed's claim that when the country is at war, the President becomes "the supreme legislator, supreme judge, and supreme executive." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 14 (1866) (Argument for the United States). This Court should reject these sweeping claims in the most emphatic terms.

The issue in this case is primarily one of jurisdiction, not conformance with procedural due process. The Government is advancing the claim that the Executive has the "inherent power" to convene military commissions for persons who are alleged "enemy combatants." Since this power is derived from the Commander-in-Chief Clause, it is argued, congressional authorization is not only unnecessary, it is beside the point, as the terms of a mere statute may impinge upon the Executive's power to try and punish the enemy. The salient point, as noted, is whether or not an "enemy combatant" order can be produced. If it can, the Executive can go so far as to try an American citizen on capital charges without trial by jury.

The Government's constitutional claims are profoundly misguided. Article III, Section 2 provides, "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Given those explicit provisions, there is no case for extending the jurisdiction of the military courts to any person that the Executive perceives to be an "enemy combatant." And

there is certainly no place in American law for special military "tribunals" or "commissions."

ARGUMENT

I. THE PRESIDENT CANNOT CHOOSE WHEN AND IF HE WILL COMPLY WITH THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY

The Government advances the argument that the President has the "inherent power" to convene military tribunals to try alleged "enemy combatants." If that proposition is true – that the President can disregard the jury trial guarantee set forth in the Sixth Amendment – it would presumably follow that the President can disregard the other constitutional protections set forth in that amendment, such as the right to a speedy trial, the right to a public trial, the right to be informed of the charges, the right to confront witnesses, the right to call favorable witnesses, and the right to the assistance of counsel. And if that proposition is true, it would presumably follow that the President can go further, if he chooses, and disregard the safeguards set forth in the other amendments, such as the ban on double jeopardy and the ban on cruel and unusual punishment.

Indeed, if the Government's constitutional claim is to be carried to the limits of its logic, the President can try any alleged "enemy combatant" in the world at any time and in any place. If the power to convene a military tribunal is truly derived from the Commander-in-Chief Clause, any federal statute that would "interfere" with that power, such as a prohibition upon executions of

"enemy combatants" who are American citizens, would constitute a violation of the separation of powers principle.

The Government's constitutional claim is preposterous. Consider the text of the Third Amendment, which provides, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." If the Commander-in-Chief does not have the power to quarter a soldier in an American household in a "time of war" except as prescribed by a law enacted by the legislature, it is inconceivable that the Commander-in-Chief has the "inherent" power to seize a member of the household, try him or her in secret, and execute the prisoner for a war crime after a summary military proceeding. The Bill of Rights cannot be so easily evaded.

II. THE CONGRESS CANNOT CHOOSE WHEN AND IF IT WILL COMPLY WITH THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY

The Government argues that even if the Executive cannot convene military tribunals pursuant to the Commander-in-Chief Clause, Congress can authorize such proceedings pursuant to its Article I powers. This claim is also without merit.

The American Constitution is a legal charter that empowers and limits government in both peacetime and wartime. *See, e.g.*, Timothy Lynch, *Power and Liberty in Wartime*, 2003-2004 CATO SUP. CT. REV. 23 (2004). The Framers of the Constitution anticipated the necessity of wartime measures, but they were also keenly aware of the need for safeguards against the arbitrary exercise of government power. Article I, Section 8 empowers the Congress

"To define and punish . . . Offenses against the Law of Nations." That is, Congress may define the offense and prescribe the punishment for persons who are convicted of such offenses. The key point, however, is that the mode of trial is not left to the discretion of the legislature. Except for impeachment proceedings, all crimes are to be tried before juries. There is no exception for "war crimes."

The text of the Fifth Amendment is also instructive: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in a time of War or public danger*" (emphasis added). The explicit exemption for cases arising "in a time of War" demonstrates that when the Framers wanted to allow for some variance from ordinary criminal law procedures, they did so.[2]

Article III, Section 3 sets forth special rules for trying persons who are accused of treason. Here is another example of where the Constitution fully anticipates situations where a citizen has levied war against his own countrymen. But instead of lowering the constitutional bar, the Framers *heightened* the constitutional standard of proof for the Government. This section provides further evidence that the ordinary constitutional procedures remain in effect for offenses other than treason – even if the offenses involve levying war against the United States.

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[2] George Washington's use of a military tribunal during the Revolutionary War does not help the Government since the pertinent provisions of the Bill of Rights were not the supreme law of the land at that time.

Congress may suspend the Writ of Habeas Corpus "when in Cases of Rebellion or Invasion the public Safety may require it." However, the suspension of the writ merely expands the power of the Executive to detain persons who are perceived to be dangerous. It does not follow that the suspension creates a prosecutorial power to try and execute prisoners. The detention of persons neutralizes any immediate threat to public safety, but if the Executive elects to exert his power beyond a brief detention and seeks to impose long-term imprisonment or the death penalty, he cannot deny the prisoners the benefit of a trial by jury.

Amicus Curiae does not challenge the constitutional legitimacy of the Uniform Code of Military Justice (UCMJ). Congress does have the power "To make Rules for the Government and Regulation of the land and naval Forces." It does not follow, however, that Congress can expand the class of persons who are subject to prosecution under the UCMJ. To reconcile the tension between the jury trial provisions and the legislative power to make rules for the "land and naval Forces," this Court has ruled that the military jurisdiction should not extend beyond those who are actually serving in the army, navy, and militia. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 122-23 (1866). That is a sensible reading of the constitutional text.

The Government seeks to improvise constitutional procedures because the war against the Al-Qaeda terrorist network is a new type of warfare, one that is not always waged on the conventional battlefield. But our constitutional republic has actually faced greater challenges than this. For example, during the cold war, the Government discovered that Julius Rosenberg had passed vital

intelligence regarding nuclear weaponry to the Soviet Union. *See* Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* 300-310 (1987). Rosenberg was tried before a jury even though he was acting as an agent of a foreign power, even though he posed as a harmless civilian, and even though his actions endangered the lives of millions.

III. PRECEDENTS THAT HAVE EXPANDED THE JURISDICTION OF MILITARY COURTS TO PERSONS WHO ARE NOT MEMBERS OF THE U.S. MILITARY SHOULD BE OVERTURNED

To properly analyze the important issues that are at stake in this case, this Court should begin with first principles. The Sixth Amendment says that jury trials are guaranteed in "all criminal prosecutions." If that language does not immediately resolve the case, it does establish a constitutional baseline. The sweeping language of the jury trial guarantee is entitled to a presumption that it means precisely what it says. Without that presumption, the overriding purpose of our written constitution is largely frustrated.

In *Reid v. Covert*, 354 U.S. 1, 39 (1957), Justice Black observed that "slight encroachments" on the Bill of Rights "create new boundaries from which legions of power can seek new territory to capture." Unfortunately, that is an apt description of this Court's jurisprudence with respect to military jurisdiction. The first "slight" deviation was to exempt members of the U.S. military from all of the safeguards in the Bill of Rights. That step seemed relatively harmless and was arguably justified by the legislature's power to make rules for the "land and naval Forces." The problem, of course, is that that precedent created "new boundaries from which legions of power" have sought

"territory to capture." After members of the U.S. military were exempted, members of the opposition forces were exempted. Next, enemy soldiers could be tried before "special" military courts, instead of the regular court martial proceeding. *See generally Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hirota v. MacArthur*, 338 U.S. 197 (1948); *Application of Yamashita*, 327 U.S. 1 (1946); *Application of Homma*, 327 U.S. 759 (1946).

Though erroneous, the precedents upholding military commissions could at least be cabined by some of the conventions of war between nation states. Uniforms, for example, made it possible to distinguish combatants from noncombatants. No one doubted that Tomoyuki Yamashita was a General in the Japanese Imperial Army. But if those precedents are now extended to loose-knit terrorist organizations, the class of persons who will be subject to military prosecution may expand dramatically. Because terrorists pose as civilians, our legal system will very likely see a steady influx of cases where the Government will be leveling "war crime" charges against persons who appear to be civilians.[3] Except for a handful of cases where the defendant will be known by all to be a member of a terrorist organization (*e.g.* Osama bin Laden), the problem of circularity will present itself.

To take a concrete example, suppose the President accuses a lawful permanent resident of the United States of

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[3] The Government repeatedly glosses over the fact that the saboteurs that were tried before a military tribunal in 1942 *did not contest their status as "enemy combatants."* *See Ex Parte Quirin*, 317 U.S. 1, 47 (1942). And *Quirin's* attempt to distinguish *Milligan* is not persuasive because Milligan's alleged offenses put him squarely into the "enemy combatant" category. If this misguided precedent must be preserved, it should only apply to prisoners who do not contest their status as enemy combatants.

aiding and abetting terrorism. The person accused responds by denying the charge and by insisting on a trial by jury so that he can establish his innocence. The President responds by saying that "enemy combatants" are not entitled to jury trials. The defendant is then flown to Guantanamo Bay for his trial before a military commission.[4]

The Government is anxious to defend, standardize, and expand the legal principles enunciated in *Quirin*, *Yamashita*, and *Eisentrager*. *Amicus Curiae* respectfully submits that it was a mistake for this Court to expand the scope of military jurisdiction beyond its actual members. Instead of expanding those erroneous precedents, this Court should overrule them so as to keep the military power in strict subordination to civilian authority. *See, e.g.*, Lynch, 2003-2004 CATO SUP. CT. REV. at 41-46; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. PUB. POL'Y 23 (1994).[5]

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[4] Although President Bush's Military Order creating military tribunals initially exempted American citizens, it is apparent that he believes he has the power to extend his order to citizens at any time. *See* Brief for the United States, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). If this happens, the jury trial will lose its constitutional foundation and will be bypassed with impunity by the Executive Branch.

[5] *Amicus* urges a return to the constitutional text and first principles. This Court made a wrong turn in *Callan v. Wilson*, 127 U.S. 540 (1888) and the errors contained in that ruling have multiplied. *See* Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL'Y 7 (1994). *Quirin* relied upon *Callan* to justify its departure from the constitutional text. *See Quirin*, 317 U.S. at 39-40. And the Government is now using *Quirin* to advance the proposition that a whole new class of civilians, a class which *denies* the "enemy combatant" label, can be denied the protections set forth in the Sixth Amendment.

The American Constitution affords our Commander-in-Chief latitude to take enemy personnel into custody in a war zone. Trials and executions are another matter entirely. Once the prisoner is disarmed and jailed, there is no military exigency. If the Executive elects to go so far as to seek the death penalty against an incarcerated individual, he should bring his evidence of criminality into an Article III court and persuade a jury of the prisoner's culpability.[6] Instead of disparaging our principles as burdensome technicalities, we should all pause to remember that our Constitution is predicated upon the dignity of individual human beings and that the protections set forth in the Bill of Rights were only established after centuries of struggle. *See Application of Homma*, 327 U.S. 759, 760 (1946) (Murphy, J., dissenting). If our constitutional principles need some alterations because of an implacable new enemy, the Executive can take his case to the American electorate and pursue the amendment procedures that are outlined in Article V.

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[6] Congress has already accommodated the Government's need to protect classified information during civilian criminal trials. *See* Testimony of Scott Silliman before U.S. Senate Committee on the Judiciary (November 18, 2001).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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